(2)

No. 03-938

FILED
MAR 11 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT F. CHRISTIAN, II, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONERS

JOHN K. LARKINS, JR.
Counsel of Record
NICKOLAS P. CHILIVIS
CHILIVIS, COCHRAN, LARKINS & BEVER LLP
3127 Maple Drive, N. E.
Atlanta, Georgia 30305
(404) 233-4171

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

1. Granting The Writ Is Appropriate, Notwithstanding The Interlocutory Appeal 1

2. The Army Cannot "Demonstrate" Harmless Error 1

3. There Will Be No "Windfall" To The Petitioners 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Christian v. United States, 337 F.3d 1338 (Fed. Cir. 2003) 2

Sullivan v. Louisiana, 508 U.S. 275 (1993) 2

Texas v. Lesage, 528 U.S. 18 (1999) (per curiam) 1, 3

VMI v. United States, 508 U.S. 946 (1993) 1

FEDERAL STATUTES:

10 U.S.C. § 613 2

Pub. L. No. 107-107, § 503(c) 4

SECONDARY SOURCES:

R. Stern, E. Gressman, S. Shapiro, and K. Geller, *Supreme Court Practice* § 4.18 (8th Ed.) 1

REPLY BRIEF FOR PETITIONERS

1. Granting The Writ Is Appropriate, Notwithstanding The Interlocutory Appeal.

It is correct that a writ of certiorari "generally" is not granted to review an interlocutory decision. *E.g., VMI v. United States*, 508 U.S. 946 (1993). "But where . . . there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. . . ." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18 (8th Ed.). The ruling sought to be reviewed has sufficient finality and concreteness to permit its review, and is fundamental to the further conduct of this case.

2. The Army Cannot "Demonstrate" Harmless Error.

Respondent has framed a single "Question Presented" as whether the government can "demonstrate" that an officer would have been retired regardless of racial and gender bias by a military retirement board. This blurs the actual issues presented in this case. One issue here is whether the government is permitted to "demonstrate" harmless error where the nature of the proceeding shows the error was structural. Another issue, however, is whether the government is permitted to "demonstrate" harmless error through a non-judicial after-the-fact administrative process created by the Federal Circuit. Contrary to Respondent's suggestion, the language of *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) that the government can defeat liability "by demonstrating that it would have made the same decision absent the forbidden

consideration" does not mean that the government is permitted to show harmless error under every circumstance, or that harmless error can be "demonstrated" by the results of a later ex parte, non-judicial determination by the offending defendant.

On the issue of whether the illegality in this case was a fundamental, structural error – and therefore not subject to a harmless error analysis in the first place – Respondent asserts that structural error exists only where a challenge is to the "legal authority to issue the decision." Resp. at 15. This position is inconsistent with precedent of this Court. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), for example, an erroneous charge to a lawfully constituted jury was found to be a structural error. Moreover, Respondent simply ignores 10 U.S.C. § 613 (Pet. App. 104), the organic law governing military retirement boards, which requires that boards be conducted without "prejudice or partiality." A military board that is instructed to act *with* "prejudice or partiality" is not "lawfully constituted."

The government's superficial reliance on the mantra that it must be permitted to "demonstrate" a same decision defense is exposed as fallacious by a single, uncontested fact: the government has conceded that it cannot prove its harmless error defense in court on existing evidence concerning the actions of the 1992 Retirement Board. It does not even argue that the results of the new proceeding endorsed by the Federal Circuit would be evidence of what occurred in 1992. Rather, under the Federal Circuit's opinion, the *Secretary of the Army* is to "determine[] which members of the plaintiff class are entitled to relief." *Christian v. United States*, 337 F.3d 1338 (Fed. Cir. 2003) (Pet. App. 22). The government's "demonstration" is simply the Army demonstrating to

itself for its own determination of which illegally retired officers, if any, are entitled to relief.

Truth be told, Respondent has piggy-backed off the structural nature of the error in this case (*i.e.*, the fact that it is impossible to determine the effect of the 1992 Retirement Board's racial and gender discrimination) to contend that it "must be furnished the opportunity," to "demonstrate" a same decision defense through a new administrative process, not to determine what the original board did (the board whose decision is in issue), but what the new process did.[1]

The Federal Circuit's opinion and the government's brief make clear that there exists a fundamental misunderstanding of the scope of the holding of *Texas v. LeSage*, and the writ should be granted to clarify these important issues of precedent and public concern.

3. There Will Be No "Windfall" To The Petitioners.

Respondent remarks that this case involves large potential damages, and seeks to characterize an award to the 882 class members as a "windfall." We respectfully disagree. Under the law, an officer has a right to the pay

---

[1] Respondent states that we made a "concession" that a "reconstituted Board could be used today to limit damages prospectively." Resp. at 19. In fact, we merely acknowledged that the Army had the legal right to conduct a proper Selective Early Retirement Board at any time and legally retire officers, including those who had not been properly separated from service because of illegal actions by an earlier board. There was no concession that a Selective Early Retirement Board may lawfully retire officers retroactively, or that the results of a future board are "evidence" of what an earlier, illegal board actually did.

and other emoluments of his office until lawfully separated from service. Such a legal entitlement can never be a "windfall," and the fact that a large number of officers were illegally separated so as to make the damages large is immaterial.

Petitioners were separated from their right to serve as commissioned officers in a process that concededly violated both Constitutional and statutory prohibitions against racial bias. The Federal Circuit's creation of a right on the part of the offending agency itself to determine "harmless error" is not justified by the government's inability to prove in court *which* of these officers would have been retired if the 1992 Retirement Board had been conducted lawfully, even if it is assumed that *some* of them would have been retired. Indeed, the Federal Circuit's judicially-created "remedy" permitting the Army to retroactively determine which officers would have been retired over a decade earlier by an illegal retirement board fundamentally circumvents the entire involuntary retirement process established by Congress. Under the Federal Circuit's holding, the Army can violate the Constitutional (and statutory) protections against prejudice in the conduct of a retirement board, and then somehow "justify" the illegal retirements in a future, self-serving process that is entirely outside the retirement procedure established by Congress.[2]

---

[2] In fact, as pointed out in our Petition, the Federal Circuit's procedure circumvents the express intent of Congress that such a procedure cannot be used in this case. Pub. L. No. 107-107, § 503(c) (Pet. App. 112).

CONCLUSION

For the foregoing reasons, and for those in the petition, petitioners respectfully request that this Court grant Writ of Certiorari and reverse the judgment of the Court of Appeals for the Federal Circuit.

Dated: March 11, 2004.

Respectfully submitted,

JOHN K. LARKINS, JR.
Counsel of Record
NICKOLAS P. CHILIVIS
CHILIVIS, COCHRAN, LARKINS & BEVER LLP
3127 Maple Drive, N. E.
Atlanta, Georgia 30305
(404) 233-4171
Attorneys for Petitioners